faced with the prospect of picking up the Manville share. The Manville share is big and there insolvent so you can't go get them.

Well what is Grace going to do? Well maybe they will be put upon in suggesting to them, you want to set up Grace for my money, this price, because if you go to trial you may have to pick up joint several liability of Johns Manville shares. Of course, they are doing their job. The clients of the ACC and FCR must, must, seek exact money for joint liability not simply several liability.

Junk Medicine. Let's just do it. A couple of quick quotes on junk medicine. Let's look at 77, Slide 77. Dr. Harron. Tens of thousands of screens. Flip to the next one. Thirty thousand. That slide. Foster, thousands, tens of thousands. Next one. Heath Mason, tens of thousands. Levine. Levine is interesting. He did not take the fifth. He filled out at least 22,000 forms but he submitted to questioning on written deposition. He attested in that deposition none of my reports I believe, no reform from any other B reader can or should be remodified or considered as a clinical diagnosis on asbestos related disease or any occupational dust disease.

Next slide. Dr. Philip Lucas, 13,000 asbestos related claims. We were going to play the transcript but we ran out of time. He fails to rule on his own testimony there are hundreds of other causes of diseases that can cause

interstitial conditions that would show up on a B read. He didn't intend to rule out any of those. Why? In his own words, I'm just taking, he says you know what the people have hired me to do this. They weren't really interested in those other conditions. They were only interested in asbestos.

Finally Dr. Gaziano gave us 22,000 and he basically says did he actually take the exposure history himself? Did he ever verify the reliability of the exposure history somebody else took? It was not his common practice. Did he actually use the standards in all of these? No. I didn't do that. So when it is getting perpetuated going forward, when you simply carry forward the settlement history, we are paying again for junk medicine.

But I'd like to close in talking about the answer to the question that I posed a little while ago which is, why would it be that we don't get taken to trial all if that's the way that more money would be paid? Why would that be? And that's where we get into the question of what else was behind this --

(Audio malfunction)

THE COURT: Are the parties on the phone trying to be heard?

UNIDENTIFIED SPEAKER: Hello?

THE COURT: Hello? Brian are you there?

(No audible response)

MR. BERNICK: I posed the question Your Honor. What was going on during this spike period at the time. And the claimant's experts were obtained to figure out some reason why that spike was specific and had something to do with Grace. They came up with theories that it was driven by Libby liability. Dr. Peterson testified he did a quasi experiment that indicated that it was Libby. What was the quasi experiment? He said well there is Libby publicity at the same time there is a spike so the two things must be related.

That's a lot of science there. So if they couldn't demonstrate that, they couldn't demonstrate that there was something unique. It turns out that Dr. Peterson ultimately had to admit, ultimately had to admit, that there was in fact a general upward trend in propensity that is the same claimants. Now there were claimants that were coming into the system for meso but not very many. The bulk of the spike means that more of the same population is suing more companies. That's why Grace's propensity would all of a sudden jack knife because more people with meso are suing it.

If it turns out that there is a jack knife against other companies, that tends to confirm it. Sure enough if you look at Slide 72, you can see that there is a jack knife of claims against people that have never been sued before. All of a sudden their propensity has gone up. Next slide after that, 71. This is Babcock and Locox, Owens Corning and Grace. You

can see them all go up. This says that everybody else's propensity are -- a lot of the companies' propensities are increasing.

So what does that tell you? That tells you that Grace is now seeing claims that were in prior years not have been pressed against them. That is more people are suing or the same people are suing more companies. You get confirmation of that in Grace's propensity. Take a look at it, it's Slide 73.

Slide 73 indicates the propensity of Manville in 2001 was 58 percent, 58 percent of all claimants sued Manville for mesothelioma. What about Grace? Grace is 45 percent. Now Manville accepts the claims of anybody exposed to any asbestos. That's it. If you were exposed to asbestos, you get in. If Grace is coming close to Manville, what does that tell you? It tells you that Grace is being sued for a lot of other people's asbestos.

Now we get to the kicker. What happens to the dismissal rates? It may be that if all these claims are going out and propensity is going up, if Grace is being sued by more people and it got many more dismissals then they net out okay. But if they are not able to manage their docket because they are overwhelmed and their dismissal rate remains constant which these folks have assumed, then what does that mean?

That means that Grace is paying more people than

that. It is being sued for other people's asbestos and it is paying those people. Now you then go back to the perspective of the claimant. The claimant is sitting there saying, hmm, do I want to go to trial or do I want to settle? If I go to trial, I can only recover against the people who actually exposed me to their asbestos. Then the rules of liability apply, joint and several liability apply, allocation applies. I can only recover the total amount of my loss as determined once.

But if I never go to trial, if I threaten people with trial and they don't have the ability to deal with me because they are overwhelmed I can go after A, B, C, D, E, F, multiple times and I am better off. The law firms are better off, the claimants are better off. That is exactly what that propensity comparison tells the Court. The truly devastating impact, tens of billions of dollars have now been put in trust to perpetuate.

This now brings me to Slide 85, 86 and 87. Let's do 85. Last chapters of law written in this case and that has actually been an informative process because in this chapter Your Honor has seen the evolution of the other side's position from being first, oh we can't look at this issue. It's already been settled. To now having to explain in detail based upon the code and the case law why it is that the system that they perpetuated for so many years has any basis of the law.

As the briefs have evolved, the theories and the struggle with what the provides and the cases provide are the best evidence, but they can't find grounding in the legal system. This diagram sets out very simply the two issues and the two answers that exist under the code and that they don't have any proper response to.

Issue one, what should be estimated? It should be how should it be estimated? Federal bankruptcy law effectively serves as a choice of law on this. It doesn't say here is how you do estimation uniquely under federal law. It doesn't say what should be estimated in the sense of defining liability under federal law. It's not a creature of bankruptcy. Federal bankruptcy law points to two sources.

One is under the allowable claim section, 502B, it points to state law. It says state law still applies. Not the state tort system, state law, which is fault based liability. That's where you go. It's the travelers decision not the supreme court. This exact analysis following 502B, the state law and contract law can say even though the fees were incurred in the course of a federal bankruptcy proceeding, the entitlement to fees is not the fees or indeed affected by the factors of the proceeding, they are governed by state law. That is what the Supreme Court decided following exactly what 502B says.

What is the choice of law with respect to how?

That's methodology. That's the rules of evidence and the rules of procedure based on our government. Theory and the state, but that's it, there's nothing else. What did they do? They have some moves. You say oh well it's not the state law, it's the state court system. It's not fault fees, it's a settlement phase. What state law says that the settlement governs five million. No state law says that. That's basically encumbered to create a federal body of law that displaces state law rather than applies it. It's one of the real ironies of the argument is that they actually chase their tail and end up swallowing it.

They end up saying state law governs, but then they introduce a law of federal entitlement for liability based upon something. Nothing says under federal law it sure doesn't exist under state law. What does it end with? Not so well. Estimation. Estimation takes place and estimation actually alters the outcome of state law because in estimation you don't look at the liability under state law. You look to liability under the state tort system. Well since when did estimation as a methodology alter 502B and state the state law doesn't control. It does no such thing.

Let me say now, if you want closure under 524G you've got to say you have no choice really unless you want to get out the bankruptcy system all together and let everything pass through, you've got no choice but to settle. Effectively that

means to get closure under 524G. For it to mean anything you've got to settle rather than litigate. 524G sets up no sort of (indiscernible). 524G does not say that your only alternatives are to settle up or go back to state court. It doesn't say any such thing. 524G says you can have a plan. It doesn't say what the trust does. It doesn't say when the litigation takes place. It doesn't set out the rules of litigation. 524G is not a new body of the federal law of liability.

Finally we come to these asbestos cases. Well the asbestos cases really set the rules of the road. And you know the code be damned, let's take a look at the asbestos cases. The asbestos case is very interesting. That's the chart. The chart after that, last line. The asbestos cases that they cite are uniform, absolutely uniform. They embark on a series of different analysis and different theories. But what is most important about them is what they held. What they held under the facts and issues that were presented to them.

In none of those cases was anybody coming in and saying we can test liability. Let's build the liability up based on the evidence and have an estimation that is driven by the rules of state law and the federal rules of civil procedure. No one ever did that. No one came in with an alternative proposed methodology. Not a single one. Everybody came in with a settlement history. They tweaked it different

ways. They adjusted it different ways. They did not come in with an alternative. They didn't dispute liability and therefore it wasn't even necessary for the Court to address the filing to the issue.

So Your Honor, I would say that there is a very simple answer to all those cases that doesn't do violence to them at all. The answer to those cases is they didn't reach because they didn't have to reach. The issue that is proposed here. That one picture there was requested, Your Honor.

THE COURT: All right.

MR. BERNICK: So what is interesting about those cases is sure they are great. They are making the proposition that you can come in with a basic agreement. It's a settlement model. All they are worried about is how to adjust the model. The Court is not going to reach the issues that are addressed in this case. Those cases are not pressed because they don't reach the issue that we have here.

THE COURT: Well the debtor always has the option of paying claims that might have been discharged.

MR. BERNICK: I'm sorry?

THE COURT: The debtor always has the option of paying claims that might have been discharged. And it can do that through agreeing to pay into a 524G trust as well as it could by agreeing to pay a creditor directly after a discharge. Can't it?

MR. BERNICK: I would believe that that is correct.

THE COURT: And I don't think 524G says anything other than that. So does the Court after noticing a hearing may enter an injunction, may enter an order confirming a plan and may issue in connection with such an order an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section. That's all 524G essentially does is supplements the discharge. So if the debtor decides in a particular case that its settlement history is an appropriate standard for what it is willing to pay into a trust, then it has that option. If it decides that it is willing to pay claims that would otherwise be discharged, it has that option.

MR. BERNICK: Absolutely.

THE COURT: All right.

MR. BERNICK: I regret that I too a little bit too much time, Your Honor, but I am done. I will save whatever time I have for a short rebuttal.

THE COURT: All right. Shall we take a lunch recess now, gentlemen? How much time would you -- oh committee.

MR. PASQUALE: Can I have about 30 seconds? Now is probably a good time.

THE COURT: Sure.

MR. PASQUALE: Thank you, Your Honor. Ken Pasquale for the official creditors committee. Your Honor, just for the

record since this is opening statement time, the creditors committee fully supports the debtor's arguments and positions and as a result we will not have an independent direct case in chief. We do reserve the right and the opportunity to cross examine witnesses. I don't see that we will need that opportunity until later in the case with respect perhaps to Dr. Peterson and Ms. Biggs.

THE COURT: All right.

MR. PASQUALE: We have one witness in rebuttal, but again that will be much later in the process.

THE COURT: All right.

MR. PASQUALE: Thank you, Your Honor.

MR. HOROWITZ: Your Honor, Greg Horowitz of Kramer Levin for the equity committee. I just want to say virtually exactly the same thing Mr. Pasquale just did. The equity committee obviously fully supports the debtor's approach to estimation and also supports and is joined in the debtor's Dalbert motion. I think as Your Honor can tell from the way that the equity committee has conducted itself, we have no desire to unduly prolonged proceedings. In our view our clients are paying for this so we'd want to keep it as short as possible.

We likewise because our clients obviously have an enormous interest in these proceedings reserve our right to question witnesses and our sole witness Dr. Heckman whose

expert report we've put before the Court would be a rebuttal witness. We note that Dr. Heckman was not the subject of a Dalbert challenge and so the equity committee never answered any Dalbert motion that was made against us.

THE COURT: All right.

MR. HOROWITZ: That's it. Thank you, Your Honor.

THE COURT: Okay. How long do you think it will take you for lunch to get wherever you are going to go? I mean to get everyone out and back I think it usually takes about an hour so I mean keep it as short as you like, but I think much less than an hour doesn't work in this building very well. An hour, okay see you back at one o'clock then. We are in recess until one.

(Lunch recess)

THE COURT: Please be seated. Who is next?

MR. LOCKWOOD: I am Your Honor. I will be right there.

THE COURT: Okay, Mr. Lockwood.

MR. LOCKWOOD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LOCKWOOD: This is somewhat unusual combination of occurrences here because unlike the normal situation where you would have motions in limine/Dalbert type exercises separate from opening statements, as Mr. Bernick has demonstrated and as we agreed we are basically combining the

two. You might ask yourself why is that? It's sort of an odd way to proceed. Well I think the answer is that if you look at the parties contentions concerning the portion of the Dalbert briefs and arguments that dealt with the question of fit, it becomes abundantly clear that the two sides here are presenting the Court with two starkly different cases.

On the one hand you have Mr. Bernick presenting Grace's so-called merits based estimation which as the Court has just heard is really essentially a form of mass tort litigation. And on the other hand you have the ACC FCR approach relying on the Owens Corning, Armstrong, Federal Mogul. You picture model which is essentially historical estimation in the sense that you look at the debtor's previous claims resolution history which is primarily settlements. But it includes as Dr. Peterson will tell you judgments as well as the measure of the estimation. And those two approaches are reflected in, obviously, the experts that the parties are proffering in support of and in rebuttal of those.

There is a certain category of ships passing in the night about all of this. In prior hearings in this case, we referred to these different approaches as sort of involving competing views of the methodology of estimation. But in reality the two approaches are based on profoundly different views of what the legal issues are ultimately in front of this Court. And how those issues to the extent that they deal with

estimation are governed by both substantive and procedural law.

I think in order to sort of get our arms around what is going on here with both the Dalbert and opening statement portions of this, we need to have a certain amount of context. What is this estimation that we're doing here after all? I mean why are we here? There is no sort of tree standing bankruptcy code provisions that says thou shalt have an estimation.

Well in the present status of the case we find ourselves in the situation in which we have both sides have filed their own plans of reorganization here. Grace's plan reorganization is conditioned on the Court estimating its present and future asbestos personal injury liability and no more than $1.6 billion of which conveniently some $1 billion would be provided by the Sealed Air Corporation, a predecessor of Grace. And the balance would be I believe Grace hopes reimbursed by its insurers. So effectively Grace can use other people's money to resolve its asbestos problems.

The committee's plan of reorganization in contrast is predicated on the Court estimating Grace's aggregate personal injury liability as at least $4 billion. And I overlooked something about the Grace plan. The $1.6 billion covers both the aggregate personal liability and the aggregate property damage liability. And while -- and it also strangely sets up two different classes of asbestos personal injury claimants who

would be treated both by going to a trust, but would vote separately.

In any event, neither of these plans is currently consensual. Both of them provide the debtor with Section 524G protection and both of them implicitly, and this is the important part here, contemplate cramming down non-consenting classes of claims or interests.

The debtor's plan and this estimation implicitly contemplate cramming down the asbestos PI and PD claimants and our plan implicitly contemplates cramming down the equity. Under some circumstances it could even amount to cram down of the unsecured creditor class although that's not presently what the numbers are expected to work out to do.

Okay, what is therefore the bankruptcy code framework for into which this estimation and the plans fit? And we've heard a lot about the code and how we have to conform to the code from Mr. Bernick's presentation. The bankruptcy code and asbestos case provides basically two alternative methods of proceeding. And a third which I would call a theoretical hybrid.

The first and sort of most common one is the creation of a trust which accompanied by an injunction which would effectively channel all of the present and future asbestos personal injury claims to the trust, which would succeed to the debtor's liability for those claims. And those claims and the

future demands as they became claims in the future would be resolved by the trust long after the bankruptcy case had been concluded.

And in particular those plans do not generally and indeed I think pretty much invariably envision any form of allowance or disallowance process of asbestos personal injury claims in the bankruptcy court itself. The other alternative which was actually illustrated by one of Mr. Bernick's charts where he listed all the bankruptcies and the money and there was one at the bottom that you may have noticed didn't have any money by it with the name Dana Corporation, is to pass through the asbestos personal injury liabilities and deal with them later. And that's exactly what the Dana plan, that chart, proposes to do with the 88,000 claims that were pending against Dana at the time they filed this petition. And some indeterminate and unestimated number of future claims.

What I call the theoretical hybrid which I've never actually seen anybody try and do is would address the problem that you can't allow or disallow demands because they are not claims. That is all the bankruptcy court has jurisdiction to deal with under the code is claims. Theoretically if you really believed what you were up to but you for whatever reason didn't want to pass everything through you could set up some sort of allowance, disallowance process to deal with the present claims. And simply just ignore the future claims and

not have a 524G trust. That would get rid of your asbestos liability to the extent that it was feasible to do that which we'll talk about in a minute, that are your actual claim creditors as of the date of bankruptcy. And you would deal with the futures as any debtor that has potential future liabilities, warranties for example and things of that nature that routinely don't get treated in bankruptcy, even if you could theoretically argue that they might be a claim but they get passed through.

Both of the plans here purport on their face to be the 524G plan because they both purport to set up a trust and have the trust resolve the claims and even though at the moment they are not consensual. So, okay, where does that -- so how does the estimation fit into that? What is it that we're doing there? well there is a number of provisions in the bankruptcy code that either explicitly or implicitly deal with estimation.

The first one is Section 502C which provides with respect to by its terms individual claims that it would take, which the liquidation of which would unduly delay the reorganization can be estimated for purposes of allowance. So 502C is allowance mechanism. Then, and this is why I used the phrase implicitly earlier, in the definition of court proceedings in Section 157B(2)(b) of Title 28, there are references -- there are provisions that permit the bankruptcy court to engage in the estimation of claims for the purpose of

confirming a plan.

But which go on to state that the bankruptcy court does not have core jurisdiction for the estimation of contingent or unliquidated personal injury tort or wrongful death claims for purposes of distribution. Then finally you've got 524G(4)(b)(2) which requires the Court as part of the confirmation of a 524G plan to determine that the funding of the plan and the trust is fair and equitable to the holders of demands in light of the amounts being contributed to the Section 524G trust on behalf of the debtor.

There again there is some notion that the Court is going to have to compare an aggregate amount the funding of the trust with the aggregate claims that future demand holders can make and make a determination that that is fair and equitable. the 157B(2)(b) definition doesn't really tell you anything about what estimation for purposes of plan confirmation is. It just sort of is a jurisdictional provision. But the provisions in Section 1129 themselves are presumably what is being referred to. And particularly in non-consensual plans the relevant provisions that would or could contemplate some aggregate estimation of the claims of a class as opposed to an allowance process for individual claims include the two -- the situations set forth in Section 1129B(2) of the code which deal with cram downs.

Under 1129B(1) for example the Court with respect to

a descending impaired class is required for cram down to determine that that plan doesn't discriminate unfairly with respect to that plan, which the case law has generally read to me. The class generally gets treated pro rata in the distributions that are going to be made to claims in that class compared with the other classes that it is contesting or being treated in some way or another better.

The second requirement is under Section 1129B(2) which is the fair and equitable requirement that has to be met. That is basically you have two alternatives for satisfying fair and equitable. One is that each -- showing that each member of the class will receive 100 percent of the allowed amount of his or her claim. Or under 1129B(2)(b) that no equity interest holder is receiving or retaining any property under the plan with respect to that interest.

There is a third category where you might conceivably have an estimation and that would be under Section 1129A(11) the feasibility requirement. If the plan provided what I'll call an uncapped 100 percent payment obligation for tort claims where the feasibility of the reorganized debtor's ability to pay those uncapped amounts could be a problem depending upon what the potential amount of those claims was in comparison to the assets available to pay them. So there could be a contest about that and the Court might well be required to again make a judgment about the aggregate amount of these potential claims

to see whether the debtor's plan would in fact be feasible or whether it would be amount to a Chapter 22 situation where the debtor would turn around and be -- wind up being back in bankruptcy because it was unable to pay those claims.

Okay, what sort of an estimation in the context of this framework is Grace asking the Court to do here? Most recently and succinctly stated in its Dalbert reply brief. It's a reply in support of its motion to exclude some of the witnesses of the ACC and FCR. And as you have heard again from Mr. Bernick earlier today what Grace asserts, is that what is being estimated here is its legal liability which it defines as what Grace is obliged or alternatively "can be compelled" to pay personal injury creditors as a Chapter 11 debtor.

That legal liability in turn Grace contends must be determined under Section 502B of the code which as the Court is well aware is the section governing the allowance of claims in a bankruptcy case. Based on this Section 502B argument Grace then sort of effortlessly concludes that this Court must estimate its aggregate liability for over 100,000 separate pending asbestos claims en mass by using a combination of the following mechanisms that Grace has caused to occur in this bankruptcy.

The first mechanism was the creation of a claims bar date which the Court will well remember the debate over and which the Court ultimately agreed to do notwithstanding the

fact that as a general proposition you don't have bar dates in 524G plan context because there is no perk if you are not -- if the trust is going to resolve the claims and not the bankruptcy court. The purpose of a bar date is generally in a bankruptcy case to indemnify the claim so that they can then be allowed or disallowed and that was not going to be the purpose for this.

Instead the purpose was to enable the Court to have jurisdiction to award sanctions if it felt they were appropriate against claimants who declined and failed to take the second mechanism, or to accomplish a second mechanism which Grace has in this bankruptcy which is the personal injury questionnaire or PIQ.

That PIQ again after much debate in front of the Court was set out and was for the expressed and stated purpose by Grace and has been argued throughout Mr. Bernick's presentation today and in his papers, for the purpose of generating information that would supposedly provide the necessary, in Grace's view, evidence that would tell the Court whether the claim of the person filling out the questionnaire was or was not valid.

The third mechanism that Grace is proposing in its so-called merit based or legal liability estimation is that Grace is submitting the testimony of a group of experts in medicine, industrial hygiene and risk analysis. To opine on the legal inadequacy from the standpoint of their particular

disciplines, medicine, risk analysis, industrial hygiene of tens of thousands of claims. And the final step in this process is the submission of the wrap it up testimony of an expert Dr. Thomas Florence who jettisons as the record will show, Your Honor, when we get to the actual evidence in this case, who jettisons his customary methodology of doing estimations to do what amounts to really a fairly simple mathematical tally of all of the claims purportedly invalidated by the experts, the previous group of experts. And then it takes the percentage of the surviving valid claims which is needless to say very low and extrapolates that to the future to allegedly demonstrate that the simpler, very low percentage of claims in the future would be legally valid.

It should be noted that none of these witnesses assuming that they could otherwise do it, which I don't believe they could, none of these witnesses is a lawyer. None of these witnesses is going to tell the Court, assuming that the Court will permit them to do so, what the actual legal requirements are and how those legal requirements and the state courts where these claims were filed and whose law the Court is obligated to apply, how that law fits, if you will, with these opinions about medicine, risk analysis, industrial hygiene.

The -- after having sort of put Dr. Florence on the number and these other experts for the number and amounts of the present and future claims and the validity, the validity of

those claims and sort of rejecting out of hand the expert testimony from the ACC and FCR as not fitting because they aren't opining as to the legal liability of Grace. And the basis of which their testimony is generally being rejected is a combination of it relates to the tasks where the tort system was broken, not is anymore but was broken, and to Rule 408 which we'll discuss later.

But having done all of that Grace then has to put a dollar figure on these claims. How does it do that? Well it gets Dr. Florence to value this reduced universe of legally valid claims that he's come up with here by using the amounts paid in settlements. Not judgments where juries and courts can determine the legal validity of the claim or the amount that the defendant Grace could be legally obligated to pay for the claim. No settlements and more only settlements of six cases. Now Mr. Bernick went through a long to do about how gee, if he used more cases he could have come up with lower values. So they are really getting generous to us in using six cases as the starting point for the valuation. And as another one of Mr. Bernick's charts demonstrated all the other values for all the other claims are in Dr. Florence's methodology, while they are not obtained by valuing those other claims by the historical amounts, they are claimed by deriving the values as ratios of the value, the settlement value of those other claims to the settlement value of the six mesothelioma claims.

So everything, the entirety of this number that Dr. Florence comes up with here is dependent upon the value. (A) the values on these six meso claims and (B) the proposition that they can use those settlement values for that purpose, notwithstanding their insistence that this is a merits based analysis which presupposes that some courts and/or jury somewhere is going to decide whether the claim is valid and what it is worth.

Then where is Grace going to go with that number if the Court accepts it? Well as long as the Court comes up with a number that is no more than the $1.6 billion for whatever the PI portion of the combined PI PD number is, we don't -- since we don't know yet what the PD number is the PI portion of that is kind of a moving target. But it's obviously somewhere south of 1.4 billion because Grace has already settled a couple of hundred million dollars worth of PD claims.

Grace is going to cram that down on the asbestos classes. And assuming that it can do that, the effect of it would be to fund the 524G trust with the PI portion of the $1.6 billion, which the Court will have presumptively ruled as Grace's legal liability for present and future claims. Then one of two things is going to happen with respect to the trust. Either the trust agreement and the TDP will have to provide that the values and the criteria which Grace has persuaded the Court to accept as the basis for the legal liability

determination will have to be baked into the trust distribution procedure so that the numbers will match. In other words, the trusts -- the Court's valuation will be the same as the trust's obligation to pay claims. That's one alternative.

The other alternative is that notwithstanding the fact that the trust -- the Court found that Grace's legal liability was $1.6 billion minus X, the trust will wind up having an obligation to pay more than $1.6 billion minus X to claimants when it resolves these claims over the many years into the future that the trust will exist. In which event, the claimant's will not get 100 cents on the dollar.

Those are the two alternatives. I personally can't figure out any other way of doing it. Since the Grace plan proposes to pay all its non-asbestos creditors 100 cents on the dollar plus post-petition interest and proposes that a shareholder should retain their equity interests, the second possibility which is that the trust might not pay 100 cents on the dollar can't work. Because it would violate the absolute priority rule as well as potentially, depending upon how far short it fell, potentially violate the unfair discrimination provision code.

So the Court effectively can't confirm a plan that would have that possibility in it. So that means basically the only option here is that the trust is going to have to be legally required only to pay those claims that the Court has

supposedly determined are legally valid using its experts here as the guidelines for that or the determinants for that. And only the amounts that Dr. Peterson -- excuse me, Dr. Florence has put up as the per claim value. Now admittedly those amounts are average values so there could be some mechanism for upper and under, but the average is going to have to be maintained.

This analysis, if I am correct about it, puts the why to Grace's constant attempts to assure the Court. For example in its opposition to our Dalbert motion at Pages 9 to 10 that, "No individual claims will be disallowed that in fact what is going on here is in fact an estimation using Grace's approach of claims for purposes of distribution because the trust will have to pay only those amounts and only those claims that this Court has determined are valid under its approach." You can -- Mr. Bernick can talk all he wants to about oh, we're just talking about an estimation of the aggregate liability, Judge. But that's just not the way this plan and the bankruptcy code are going to work here.

So the question then becomes what is the authority for doing that? And I find, I find it interesting that we didn't hear anything about the case, in his oral presentation, about the case that most closely resembles what he's trying to do here. I mean he blows off all the asbestos estimations as, oh, those lawyers that contested the estimation in that case

they were all pretty stupid. They are not clever like me. They didn't realize that they can actually have a merit based estimation and parade a whole bunch of experts in here and get the Court to listen to the experts and conclude that all these claims are bogus and worthless.

They went ahead and they said oh, well, we'll just sign up with the incompetent Dr. Peterson and the inexperienced Ms. Biggs and we'll have just one of these settlement based estimations that are clearly, you know, violate Dalbert, the infrastructure of the bankruptcy code and we'll just agree to do that because hey it'd be too much work I guess to actually have a merits based estimation. Remember every one of those estimations was contested by somebody, a creditor class who felt they were being unfairly discriminated against. Every one of them had incentive to track what was the best way to produce a --

(Audio malfunction)

There is nothing that Grace has presented to this Court that suggests that somehow the arguments that it's making about bad doctors and exposure minimums and relative risk and requirements at 2.0 and all that kind of stuff wouldn't apply to the asbestos claims that were being estimated in those cases. So basically it's Mr. Bernick who is the only lawyer in the country who has been smart enough to figure out that this is the way to do it and these other cases are not the way to do

it.

Well okay, what's his authority for the fact that he can do it? Well in his papers he cited two cases Dow-Corning (phonetic) which he litigated and A.H. Robinson, which is not an asbestos case. Well Dow-Corning is a particularly interesting case and I really ask Your Honor to read it. It's very long but it is extremely informative on the issues that we're talking here.

For openers, the parties in Dow-Corning, both sides asked the Court to do a mass estimate of the best impact claims. Judge Spector said no, I'm not going to do that. Why did he say he was going to do it -- not going to do it? Well among other things he said that because the Dow-Corning plan like the Grace plan here proposed to put a cap on the amount that would go to fund the breast implant claims for disease. The explanation scarring et cetera those claims were not at issue here. Because it was going to cap that liability $2 billion, he concluded that that would be an estimation for purposes of distribution because if the claims came in over that amount of money they wouldn't get paid somehow. Whether it would be some claims that wouldn't get paid any or all claims would get paid a percentage or whatever. He said he couldn't do that.

And he relied -- this was largely -- there were a number of reasons why he couldn't do it. One of them was that

only the district court could do it under 28 USC 157B(2)(B). Another was that you have to have a jury trial on the issues because it was an estimation for purposes of distribution under 28 USC 1411. And another was ironically that he didn't need to do an estimation because he can do an allowance process. And the only reason to do an estimation is if it is going to save you time over doing an allowance and he concluded that he could do an allowance.

Okay. What -- how was he going to go about doing the allowance? Here he believed, and the parties appear to agree although there was some dispute from the tort claimant's side, that there was uniquely at least compared with asbestos uniquely, a single overarching common issue that could be litigated in Dow-Corning. And that was what we call here a general causation issue, namely did the silicone gel used in breast implants was it capable of causing disease? And if it wasn't, as Mr. Bernick's client Dow Corning was asserting capable of causing a disease, then there were no claims, period, for those diseases, which I said earlier was the guts of the case.

Well the allowance never took place but Judge Spector how he thought it should take place. As he characterized it, and I'm going to quote here, he was accepting the parties' invitation to provide "serious recommendations intended to nudge the parties toward an agreement on how this case can be

resolved fairly but expeditiously." That's Page 570 -- 211 Bankruptcy Reporter at 574, Note 29.

Judge Spector at Pages 574 to 597 which is a lot of pages so I'm not going to go through in detail, but basically he concluded that he could do potentially have a Rule 42 common issues trial on this general causation issue that would be based on an omnibus motion that Dow-Corning had filed objecting to all claims with respect to this silicone gel causing disease. That's a heck of an omnibus objection I might add. I'm not sure in Delaware even with the Court's ability to have omnibus objections that you could have a substantive omnibus objection against 100,000 claims. But be that as it may, Dow-Corning had filed one, Judge Spector was prepared to look at it, and he further thought there was a possibility because Judge -- because Dow-Corning had filed a concurrent motion for summary judgment that he would have jurisdiction to rule on summary judgment on that day on that issue.

However, he went on to discuss at some length what would have to happen if he couldn't grant summary judgment on that motion which again I might add he never did. He identified a host of problems with what we have including the need for multiple trials, the need for juries, the need for individual determinations of specific causation and damages, ie if he determined the general causation requirement favorably to the plaintiffs then the issue would be would how much of dosage

or what have you, the same sort of specific causation issues that are being addressed when we talk about, you know, do you have enough asbestos in your lungs, do you have enough exposure, et cetera, et cetera, to be a substantial contributing factor to your disease. Those are specific causations because they are addressing the individual claim.

And at the end of the day he never resolved any of that. He just simply said I'm going to deny the estimation motions. I'm going to consider the debtor's motion for summary judgment on its omnibus objections and conditionally if he denied the causation -- the summary judgment motion on general causation he was going to send his opinion to the district court as a recommendation as to how that court should proceed to litigate -- liquidate those claims.

Now if we apply the Dow-Corning decision to this case what does it tell us? Well it says first you can't use estimation in the bankruptcy court which is where this estimation proceeding is going on, can't use estimation to impose the cap liability amount on a non-consenting class of creditors in lieu of actual allowance or disallowance procedures, which I might add Your Honor has repeatedly stated that we are not allowing or disallowing claims. You have no intention to do that and Grace in its papers has agreed that we are not allowing and disallowing claims.

Even if there was some mechanism for avoiding the

individual allowance, disallowance problems identified by Judge Spector, this Court would at most have the power to rule favorably to Grace on a summary judgment motion on an omnibus objection to all asbestos claims on the ground that asbestos doesn't cause disease. Not surprisingly, we haven't seen that motion because there is no dispute that asbestos causes disease. The dispute is if somebody -- does somebody have an asbestos related disease and if they do, did exposure to a Grace product constitute a substantially contributing factor to the development of that disease? Both of which are the do you have a disease is individual to the plaintiff, and do you have exposure to a Grace product in sufficient amounts to have contributed to that, to substantially contributed to that disease?

Again it looks at the individual work history of the individual claimant. So there is just no mechanism for achieving even the theoretically possible result in this Court that Judge Spector thought he might be able to achieve in Dow-Corning. So under Dow-Corning if Grace actually wants to litigate the merits of its liability for these claims in this Court -- well first it can't do it in this Court. It would have to have the district court withdraw the reference because as we've noted earlier this Court doesn't have the power to, either through estimation or otherwise address the allowance of personal injury claims.

Secondly, the district court would then have to identify and determine the consolidate -- the so called common issues and you would have to address what, if any, issues could be addressed on summary judgment. You have to empanel juries for all claims not summarily adjudicated and you then have to try the resulting cases including individual issues such as specific causation and damages.

Needless to say that is not what this Court contemplates doing. And I would note in that connection that the Rule 42 approach was (A) tried by Mr. Bernick in the Babcock and Wilcox case or was proposed and after Judge Vance inquired of Mr. Bernick how many cases over how many years was she as the district judge who he persuaded to withdraw the reference for this purpose going to have to spend on these cases and they requested further briefing on that subject. That was the last anybody heard about the 42 trial, case settled.

Secondly, he also originally proposed to do it in this case. But for reasons which I suspect have something to do with his realization that it simply wouldn't work in anybody's lifetime in this Court or Judge Woolan or whoever had the case at the time wasn't going to be very receptive to that, he withdrew that proposal. And instead he moved to have an aggregate estimation. But when he moved to have an aggregate estimation, he made sure to move to have an aggregate "merits

based" estimation, notwithstanding the fact that that term appears to have been invented by Mr. Bernick for purposes of this case.

The only other case offered by Grace in support of what it wants to do here is the one we heard about earlier today which is the A.H. Robins case. The Court can read the A.H. Robins case for itself. I submit to you that it is a pretty slender read here.

First, the context of the case was in the fourth circuit that the class of Dalcon Shield claimants whose claims were being addressed in that estimation had voted 95 percent in favor of that plan. Notwithstanding the fact that the disclosure statement expressly stated that the payments to claimants under that plan were going to be limited to the amount being contributed for that purpose by the debtor, some $2.5 billion, that the estimation was inherently uncertain, and that as a result it was possible that the claimants wouldn't get their share of what that number was supposed to produce by way of a recovery.

Indeed, the appeal was from a dissident group of claimants and the actual grounds for appeal that they were raising were 1129A(11) feasibility and 1129A(7) best interest. And as for the feasibility objection since Robins was never going to have to pay any more than the estimated amount and since there was no dispute that it had the ability to pay the

estimated amount, the feasibility objection is sort of ridiculous on its face. Of course it was feasible. I mean, all it had to do was pay the money and walk away. That was the end of it.

There would be no subsequent claims against Robins because they were being cut off, discharged. As for the best interest test, the opinion is absolutely opaque as to what the estimation issue was related to best interest. I mean, I can't -- I don't know what it was. It certainly however didn't seem to -- none of the issues, none of the arguments seem to involve what we've got here which is a situation in which you had some multi-expert, multi-disciplinary, multi-expert case that was going to determine A.H. Robins legal liability for Dalcon Shield claims for all time and all purposes in an aggregate mass tort litigation. Instead what can be gleaned from the opinion was there were a number of different experts much as there are in asbestos cases who come in and testify that in their opinion the aggregate amount of the liability based on whatever criteria they chose to bring to that assignment is in their judgment this horrible term that Mr. Bernick keeps saying, their judgment X dollars and the district court chose among them.

He came -- the district court came up with a number which happens to conform to Francine Rabinowitz who is a typical asbestos expert who comes in and uses the same

methodologies that Dr. Peterson and Dr. Biggs use usually and yeah, she didn't -- she used the questionnaires to determine that some of the claims weren't valid and beyond that who knows. But the bottom line is that number one, you can't tell how it was done except to know it was done differently from what Grace is doing here. And secondly, it was a battle among estimation experts, not among doctors and industrial hygienists and what have you.

The final thing, I have to say is I would suggest that Your Honor read Judge Spector's view of what happened in A.H. Robins which appears at 211 Bankruptcy Reporter at 601 at Note 60. To put it mildly he had some questions about the integrity of that entire process and how it played out. In any event, the -- what is going on here is in our judgment a fundamentally illegitimate use of Dalbert in this sort of mass aggregation context.

What is going on here is the experts are being asked to testify about albeit in a sort of combined fashion about the legal validity of whole classes of claims against Grace. And the -- as I've attempted to elaborate here the legal merits of individual claims, even if they went into groups, is simply not and cannot be an issue in this Court.

Secondly, the experts while it can give opinions about medicine and risk analysis of law, excuse me, and industrial hygiene they cannot come in here and usurp the

powers of the court or the jury in telling the Court whether claims are legally valid or not. But that is exactly what is happening here because what you are being asked to take these criteria that Grace is positing in here and do one of two things with them through these experts.

One is since Dr. Florence simply zeros out everything that they say isn't valid, that's a legal judgment. Because the questions of what is the evidence needed to support a personal injury claim at the end of the day is something that a judge determines or a jury or a combination of the two. It's not something -- and the expert can opine on the medicine and the components of it. But they can't say and I'm right and this claim isn't any good and that is what they are doing.

The alternative is what Grace might be arguing, is that no other expert in the world could have credible difference of opinion on these subjects. This is the Dalbert angle. Dalbert as you know doesn't decide the law. I mean Dalbert isn't a rule that says an expert that the trial judge determines whether some expert's testimony is a correct statement of law. Dalbert is an issue about whether or not expert testimony is admissible in the trial of a contested issue of fact. And if there is two sets of experts whose testimony is both admissible then the trier of fact ultimately decides on the basis of the particular case in front of it which of those experts is more credible on the facts of that

case.

Grace seems to be suggesting at points in its argument that because it -- the experts in-house are so credible and so persuasive and so credentialed that no other expert could possibly be admitted in the case, in an individual case to controvert their finding, if you will, that a plaintiff not meeting their criteria doesn't have a valid case. And again, that's not what this Court is here to do nor could it.

Even if in some way or another you could try and argue that there was some basis for having this mass allowance disallowance process done in this Court, the ACC and the FCR aren't the parties that could do that. As the Kensington case in the third circuit clearly held, the ACC and the FCR do not -- excuse me, not the ACC, official committees do not bind by their actions individual members of their constituency. And while in the case, in that case the issue was whether they were bound by failing to raise and objection or something and in this case it is a different issue. The principle is the same.

We can't -- I remember at one point in one of the charts Mr. Bernick had he said the ACC and the FCR could have taken discovery on all of these claims. That was his response to our argument that the personal injury questionnaires didn't afford individual claimants the full panoply of protections that they would normally have in a trial to get discovery against the defendant. For example, to find product ID

evidence that the product was used at their work site, even though they themselves might not have personal knowledge of that.

He said oh the ACC and FCR can take discovery about that. Wrong. We are not -- we don't have the legal capacity to litigate that issue, A. And B, the notion that we're going to try 100,000 individual claims on behalf of 100,000 individual claimants, even if they are put into baskets or groups so that we don't have to try 100,000 separately we can maybe only try, I don't know, I don't know what the number of permutations and combinations are of medical evidence, exposure evidence, risk analysis. There's going to be a lot of different issues being tried.

And at the end of the day, the notion is that those trials would bind the individual claimants with respect to their claims because their claims in this so called estimation would not be funded by Grace in the 524G trust.

As a result the testimony of these experts in Grace does not meet the Dalbert fit. It's not that somehow or another they are not competent to testify or that even the subjects on which they propose to testify are not the subjects that experts could testify about. I mean obviously there is disputes about individual aspects in the testimony. But there is a general proposition. Nobody is here saying you can't have expert testimony about medicine or industrial hygiene or risk

analysis. That's done all the time in individual cases.

The lack of fit here arises from the fact that what they are doing is telling the Court how the Court should resolve the merits of these individual claims and that's not what the whole Court is or can be here to do. In contrast, what sort of estimation are the ACC and the FCR asking the Court to do? We're not asking the Court to estimate anybody -- the merits of anybody's individual claims. But under 28 USC 157B(2)(b) as I noted earlier this Court does have the ability to estimate claims including PI claims for purposes of confirmation.

The committee and the ACR -- excuse me, the committee and the FCR's plan does contemplate a cram down on equity. If the Court using the estimation methodologies for estimating aggregate claims against the debtor for purposes of confirming the plan over the objections of other creditors who are claiming unfair discrimination for example, were to determine that through the testimony of our experts and the experts of the debtor and the equity committee and the unsecured creditors committee. There's at least two other experts in here, Mr. Dunbar, Dr. Dunbar and Dr. Chambers that have the same type of approach to estimation. And who make the same kinds of judgments. And there, there is just a dispute among those experts as to how you arrive at the right number using these approaches and what the right number should be.

But if the Court were to determine for example the number of proposed in the committee's FCR joint plan was no less than the amount of the estimated liability, then the committee's plan would be confirmable. And remember exclusivity has been lifted in this case. So there's two plans out there and short of a consensual resolution which those two plans become one plan, those -- both of them theoretically would eventually have to be sent out for a vote and both of them the Court would have to consider whether they can be confirmed or not.

So from the committee's point of view the type of estimation that we're seeking here or we're sponsoring, if you will, does in fact have some utility under the bankruptcy code. It is within the jurisdiction of this Court and can appropriately be carried out.

While Mr. Finch, my partner and Mr. Mullady for the futures rep is going to address the specific attacks that have been made on Dr. Peterson and Ms. Biggs, I did want to make a couple of points about that. The -- since, as we mentioned earlier, you not only have to potentially make a cram down estimation on these plans but you also have to make a fair and equitable determination under Section 524G that the trust is being adequately funded.

There is, while 524G creates the opportunity to avoid years if not decades of individual allowance and disallowance

procedures, and also gives you the ability to deal with future demands which an allowance process would not, it also contemplates by definition estimating large numbers of present and future unliquidated claims whose validity and value must be predicted under state law which can change and those predictions of the numbers and values of future claims are by definition not susceptible to scientific answers.

There's a lot of talk here of science. There's a lot of things bankruptcy courts do in the way of deciding issues and under various code provisions that don't involve science. I mean incumbent valuations which is the other part of confirmation issue. It's not science to have some experts up here telling you what they think the company is worth. And indeed, Mr. Bernick's analogy earlier of the stock market. In fact when you value a company even though you don't -- to some extent you are being the stock market. You are being the substitute for the stock market. What is this company going to be worth?

Everybody in the room knows that the minute the company no matter what you valued it at, emerges from bankruptcy and starts trading things are going to happen. The value of The stock even -- first they turn out that The market differs and The value of The stock that The bankruptcy judge valued at $10 a share turns out to trade at 8 or 12. Secondly, over a period of time a lot less than five to seven years, it

could be months, the values of that stock are going to fluctuate because market conditions, economic conditions, the competence of management, whatever. You know going in that that value is not going to be The same forever. And The people who do it use judgments, they don't use science.

And what 524G requires us to do here is a practical matter is something really quite similar to that. Because it's a practical focus. We know, the statute itself Section 524G(2)(b)(2) requires the bankruptcy court to determine that "The actual amounts, numbers and timing of such future demands cannot be determined." Right there in The statute.

By Grace and The equity committee, by seeking to exclude testimony from Dr. Peterson and Mr. Biggs -- and Ms. Biggs on The ground that it is not scientific is based on judgments and assumptions and is inherently uncertain and susceptible to being proven erroneous by future events are effectively trying to create standards for aggregate tort liability estimations in Section 524G that would effectively make them impossible to accomplish.

And the effect of making them impossible to accomplish would basically mean to render nugatory Section 524G and any other provisions that we've been through here that would require some kind of aggregate estimation to compare a class of unliquidated claims treatment versus classes of liquidated claims.

The argument also ignores in its focus on science and replicability and The challenge to The experts The fact that it is undisputed in this case that outside of bankruptcy corporations including Grace itself pre-petition, insurers and others, investment bankers what have you, routinely use similar methods to that used by Dr. Peterson and Ms. Biggs here for the purpose of estimating company's present and future asbestos liabilities for such purposes as trading in stock of those companies, preparing financial statements for submission to the SEC and the like.

This is not therefore the type of estimation which is The made for litigation kind of expert opinion which is frequently rejected by courts on The ground that it is not a recognized discipline.

As for Grace's Rule 408 argument, it's never been applied in any cases. This is another example of Mr. Bernick I guess being smarter than all The other lawyers around that never thought about This one before. The only case in which it has ever even been discussed is another one of Mr. Bernick's cases, Babcock and Wilcox in which Judge Brown rejected The argument. I mean he's got a lot of explanations abut what else happened in The case. The fact is The case squarely holds Rule 408 doesn't bar estimation -- opinion testimony by an expert like Dr. Peterson about a company settlement history.

We've argued that in our papers The technical aspects of why Rule 408 doesn't apply. Mr. Bernick's response in his reply brief is pretty -- is a series of bullet points that don't really provide any significant authority to The contrary for The proposition that you can -- you could even admit all these settlements as long as you are not trying to prove liability for The invalidity of a claim or its amount. The testimony here is not taking a particular settlement or group of settlements from The past and saying Grace has legal liability for these particular settlements in The future. Or Grace has even legal liability for a case very similar to these cases in The future.

It is simply a method of trying to figure out how much money Grace, outside of bankruptcy, post bankruptcy if you will, would have to pay for these cases. And Mr. Bernick spent a lot of time talking about how conservative his experts are. Well The fact of The matter is that This is an extremely conservative assumption because as Mr. -- as The evidence will show in This case The reason Grace settled cases, The reason that virtually all asbestos defendants settled The vast majority of cases against them, is that they have made a determination that it is cheaper for them than to try The cases.

Sure if they try The cases they will win a lot more of them. But The problem is that The ones they lose they get

killed. And as Dr. Peterson has pointed out in one of his reports, he actually substituted The sort of -- The litigation history which is The only thing resembling an actual merits based history that Grace has. If you substituted that history for The settlement based history as opposed to combining The two wherein The judgments The verdicts get, because they are such a small percentage, The effect of them is dramatically reduced. But if you substituted them you would wind up with Grace paying very, a lot fewer cases, a lot more money. And The total Grace liability would be way, way higher than The highest number that Dr. Peterson or Ms. Biggs has come up with here.

There are also -- they've also tried to blow off The notion that Rule 703 allows an expert to testify about things that would be inadmissable as The basis for opinions. They cite some cases. Read The cases, Judge, they don't support that notion here. And particularly what they don't support is whether Mr. Bernick likes it or not, The estimation methodology utilizing This type of analysis is routinely used by experts in This field for This purpose.

Now at their conclusions -- but the fact is it is used and testified in a lot of cases that it is used outside of litigations as I said earlier and under those circumstances for them to use the same type of factual basis, whether it's admissible as we say, or in admissible, as they argue, is

simply not prohibited under Rule 408.

The final point which continues to frankly just sort of amaze me is Grace's own use of settlements notwithstanding Rule 408. I mean at one point in their reply brief they refer to our raising this issue as a, quote, schoolyard taunt, which I kind of like that. That's cute. It's not a schoolyard taunt. It's basically saying Grace cannot ask this Court to rule the same -- opposite directions on the same issue at the same time.

If Grace is right, then Rule 408 prohibits reliance by an expert on settlements for amount. The rule itself specifically talks about prohibiting use of them for purposes of determining the amount. You can't go into -- in front of a jury in a personal injury case and say, oh, well, you know, we had discussions about -- I admit there's liability here, but I had discussions with the plaintiff's lawyer, and he was willing to agree to pay -- take $10 for this case that he now says he wants a million dollars for. And the only dispute is about the value of the case. You can't do that.

So if Rule 408 means what he says it does, then Mr. -- Dr. Florence's testimony is out the window, and the only evidence that would be available that wouldn't violate Rule 408 is the judgment values, which I just pointed out a few minutes ago would produce a number way bigger than what Grace says its liability here is.

At the end of the day, Your Honor, all of these problems that Grace asserts that the ACC and the FCR are somehow creating for it in the position we're taking in this bankruptcy and preventing Grace from sort of utilizing the Bankruptcy Code in the way in which it was intended are of Grace's making not ours. Grace was the one that filed the voluntary Chapter 11 proceeding. Grace is the one that seeks to get 524(g) protection against future claims that would otherwise not be dischargeable in a Chapter 11 proceeding. Grace is the one that has decided to attempt to use its Chapter 11 case as a vehicle for attempting to litigate the validity of most of the asbestos PI claims against it.

If Grace's lawyers and experts are to be believed, and Grace's asbestos personal injury liability is well under a billion dollars, Grace can propose -- easily propose a plan similar to the data plan which had 88,000 pending claims in front of it and just passed through those claims to be litigated. And if the court system has been fixed through all the tort reform that's out there and through all of these expert witnesses that Grace could have brought to bear prior to its Chapter 11 proceeding but elected not to use it except in rare instances, but now they're going to come in and they're going to say to the law -- the judges, federal judges, state judges, whatever, you can't have a claim unless you meet these criteria, then they can sell that to those judges and those